Supreme Court, U.S.
FILED
AUG 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1963

In the Supreme Court of the United States

OCTOBER TERM, 1985

R.O. GIVENS SIGNS, INC., PETITIONER

v.

TOWN OF NAGS HEAD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 6

Heckler v. *Chaney*, No. 83-1878 (Mar. 20, 1985) 6-7

Linda R.S. v. *Richard D.*, 410 U.S. 614 7

Maine v. *Thiboutot*, 448 U.S. 1 ..... 4, 5

National Advertising Co. v. *City of Ashland*, 678 F.2d 106 ..... 2, 5-6

South Dakota v. *Adams*, 506 F. Supp. 50, aff'd *sub nom. South Dakota* v. *Goldschmidt*, 635 F.2d 698, cert. denied, 451 U.S. 984 2

State v. *Joyner*, 286 N.C. 366, 211 S.E.2d 320, appeal dismissed, 422 U.S. 1002 4

United States v. *Lovasco*, 431 U.S. 783 6

Vermont v. *Brinegar*, 379 F. Supp. 606 2

Statutes and regulation:

Highway Beautification Act, 23 U.S.C. 131 *et seq.*:

23 U.S.C. 131 ..... 1, 4

23 U.S.C. 131(a) 2

23 U.S.C. 131(b) 2, 6, 7

23 U.S.C. 131(c) 2

Page

Statutes and regulation—Continued:

23 U.S.C. 131(d) 2
23 U.S.C. 131(g) 2, 4, 5
5 U.S.C. 701(a)(2) 6
28 U.S.C. 1361 ..... 1, 6, 7
42 U.S.C. 1983 ..... 1, 3, 4, 5
1982 N.C. Sess. Laws ch. 1147, § 1 (codified at N.C. Gen. Stat. § 136-131.1 (Supp. 1983) 3
Nags Head, N.C., Ordinance § 6.04E(6) (May 1, 1972) 2
23 C.F.R. Pt. 750 2

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1963

R.O. GIVENS SIGNS, INC., PETITIONER

v.

TOWN OF NAGS HEAD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner claims that it is entitled to just compensation under the Highway Beautification Act, 23 U.S.C. 131, for the removal, as required by a local ordinance, of its outdoor advertising signs along a federally-subsidized interstate or primary highway and that it is entitled to enforce that right in one of two ways: (1) an action against state and local officials under 42 U.S.C. 1983 for their failure to provide him with just compensation, or (2) a mandamus action under 28 U.S.C. 1361 to compel the Secretary of Transportation to deduct 10% of North Carolina's federal highway funds as the penalty for the state's noncompliance with the just compensation requirements of the Act.

1. a. The Highway Beautification Act, 23 U.S.C. 131, directs the Secretary of Transportation to establish a system of controls governing outdoor advertising adjacent to interstate and federally-subsidized primary highways. Designed

"to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty" (23 U.S.C. 131(a)), the controls are described in general terms in 23 U.S.C. 131(c) and (d), and implemented in detail by the regulations of the Federal Highway Administration, 23 C.F.R. Pt. 750. Under the highway beautification program, states are required to maintain "effective control" of outdoor advertising or suffer the loss of 10% of the federal highway funds they would otherwise receive. 23 U.S.C. 131(b) and (c); see *National Advertising Co.* v. *City of Ashland*, 678 F.2d 106, 108 (9th Cir. 1982); see generally *South Dakota* v. *Adams*, 506 F. Supp. 50 (D.S.D.), aff'd *sub nom. South Dakota* v. *Goldschmidt*, 635 F.2d 698 (8th Cir. 1980), cert. denied, 451 U.S. 984 (1981). The "[j]ust compensation" requirement established by 23 U.S.C. 131(g) — *i.e.*, the source of petitioner's putative federal right here at issue — is one element of the participating states' obligation to maintain "effective control." See *National Advertising Co.* v. *City of Ashland*, 678 F.2d at 108; *Vermont* v. *Brinegar*, 379 F. Supp. 606, 610-613 (D. Vt. 1974). Although the Act provides the states with a "powerful incentive" to adopt conforming highway beautification programs, the "scheme of the statute is to grant the state[s] an election, not to mandate payment" of just compensation under 23 U.S.C. 131(g). 678 F.2d at 108. Accordingly, the Act creates neither "federal rights in favor of billboard owners" nor a "private cause of action for their benefit." *Id.* at 109.

b. In May 1972, the town of Nags Head, North Carolina, enacted a zoning ordinance prohibiting the construction of off-premises commercial signs and requiring that all such existing signs be removed by the end of a five-year period (Nags Head, N.C., Ordinance §6.04E(6) (May 1, 1972); Pet. App. 24, 29, 38-39). Tourism is a "vital part" of the economy of Nags Head, and the town enacted the ordinance to

enhance the "scenic beauty" of the area (*id.* at 39). The ordinance did not provide the owners of these signs with compensation for their removal. Instead, the ordinance contemplated that the owners would amortize their costs over the ensuing five-year period before the signs were to be removed (*ibid.*).

Petitioner is a corporation engaged in the business of commercial advertising and owns 30 off-premises commercial signs within the boundaries of Nags Head (Pet. App. 25, 39). After the conclusion of the five-year amortization period, in January 1978, petitioner brought suit in state superior court seeking, in the alternative, a declaratory judgment that the ordinance was invalid or compensation for the removal of its signs (*id.* at 38). The state superior court held that the Nags Head Ordinance was invalid, inter alia, on the ground that it failed to provide compensation for the removal of the signs, as required by a state statute that was adopted to implement the Highway Beautification Act, 1982 N.C. Sess. Laws ch. 1147, § 1 (codified at N.C. Gen. Stat. § 136-131.1 (Supp. 1983)) (see Pet. App. 24-25 40).

The North Carolina Court of Appeals reversed (Pet. App. 38-48; 58 N.C. App. 697, 294 S.E.2d 388 (1982)). The court held that the ordinance was not preempted by the state statute because the state statute applied only to those signs that were "lawfully erected," and petitioner's signs had been rendered unlawful by the Nags Head Ordinance (Pet. App. 43). The court stated that this result may be inconsistent with the 1978 amendments to the Highway Beautification Act, but held that the state statute had not incorporated those amendments at the time of the trial (Pet. App. 43-44). In addition, the court held that petitioner could not bring suit under 42 U.S.C. 1983 for an alleged violation of the Highway Beautification Act, on the ground that that

Act did not create "individual rights" and simply "authorizes federal-state agreements pursuant to which state regulatory statutes may be adopted" (Pet. App. 48).[1] The North Carolina Supreme Court declined to review the judgment of the state court of appeals (see *id.* at 25, 32; 307 N.C. 127, 297 S.E.2d 400 (1982)).

c. Petitioner thereafter brought suit in the United States District Court for the Eastern District of North Carolina against several state, local, and federal officials (Pet. App. 29-30). The district court ruled that petitioner's first five claims for relief were barred by the judgment entered in the earlier state court suit (*id.* at 32-33). The court also rejected petitioner's sixth and seventh claims, which alleged that the federal defendants had improperly approved the state's request to reclassify the highway along which petitioner's signs were located (*id.* at 33-34).[2] The district court held that "the reclassification decision did not serve to deprive [petitioner] of any benefits to which it was entitled" because the state court of appeals had held that petitioner had no right to compensation for the removal of its signs (Pet. App. 33-34).

---

[1]In the state superior court, petitioner had moved to amend his complaint to raise a claim under 42 U.S.C. 1983 after this Court had decided *Maine* v. *Thiboutot*, 448 U.S. 1 (1980) (see Pet. App. 47). The state superior court denied petitioner's motion (*ibid.*), and the state court of appeals upheld the superior court's ruling on the ground, as stated in the text, that petitioner had failed to state a claim under the Highway Beautification Act (*id.* at 47-48).

In addition, the court of appeals reversed the superior court's ruling that the Nags Head Ordinance was "confiscatory." Pet. App. 46 (citing *State* v. *Joyner*, 286 N.C. 366, 211 S.E.2d 320 (upholding three-year amortization period for nonconforming uses), appeal dismissed for want of a substantial federal question, 422 U.S. 1002 (1975)). The court of appeals also resolved several other issues that are not pertinent to the questions presented in the petition (see Pet. App. 44-47).

[2]Reclassification from primary to secondary status under the federal highways program has the incidental effect of eliminating the "[j]ust compensation" requirement of 23 U.S.C. 131(g) as to the affected highway. See 23 U.S.C. 131 (applicable only to interstate and primary highways).

The court of appeals affirmed the judgment of the district court in an unpublished opinion (Pet. App. 22-28). The court held that petitioner's earlier state court suit barred petitioner from relitigating the claims that it sought to raise in this suit in federal court (*id.* at 27).

2. a. Petitioner contends (Pet. 10-11) that 23 U.S.C. 131(g) guarantees it a federal statutory right to "[j]ust compensation" for the removal of its signs and that the courts below erred in refusing to allow it to enforce that right in an action against the respondent state and local officials under 42 U.S.C. 1983 for their failure to compensate petitioner. However, both courts below held that petitioner's present action in federal court was barred by virtue of the judgment entered against it in its earlier suit in state court. Petitioner does not directly challenge those rulings. Rather, it claims (Pet. 12) that the judgment entered in its earlier state court suit should not be given preclusive effect because state courts lack jurisdiction to adjudicate claims arising under the Highway Beautification Act. That argument is misdirected. Section 1983 generally provides a cause of action for the violation of federal statutory rights (*Maine* v. *Thiboutot*, 448 U.S. 1 (1980)), and the state courts have concurrent jurisdiction with the federal courts over claims brought under that statute (*id.* at 3 n.1). Indeed, the state court of appeals in petitioner's earlier suit ruled against petitioner on the merits of its Section 1983 claim (see Pet. App. 47-48; page 4 & note 1, *supra*).

In addition, the state court of appeals held (Pet. App. 47-48) that 42 U.S.C. 1983 does not provide petitioner with a cause of action to obtain compensation from the respondent state and local officials for the removal of its signs because the Highway Beautification Act creates no "individual rights" in sign owners. That ruling is consistent with the only decision by a federal court of appeals on this issue. See *National Advertising Co.* v. *City of Ashland*, 678 F.2d

at 108-109. Accordingly, review by this Court of petitioner's claim is not warranted.

b. In the alternative, petitioner claims (Pet. 11, 15-19) that it is entitled to bring a mandamus action in the district court under 28 U.S.C. 1361 to compel the federal respondents to deduct 10% of North Carolina's federal highway funds as a sanction for the state's noncompliance with the Highway Beautification Act. However, petitioner did not assert this claim in the court of appeals and therefore may not raise it here. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[3] Moreover, there is no conflict among the circuits on this question.

In any event, petitioner's claim lacks merit. An agency's decision whether to initiate enforcement proceedings, like those contemplated by 23 U.S.C. 131(b), is "committed to agency discretion by law" (5 U.S.C. 701(a)(2)) and therefore is not subject to judicial review in the absence of statutory guidelines for the agency to follow in exercising its enforcement powers. See *Heckler* v. *Chaney*, No. 83-1878

---

[3]Petitioner cited 28 U.S.C. 1361 in its complaint (C.A. App. 21) and sought an order directing the Secretary of Transportation to deduct 10% of North Carolina's federal highway funds as well as an order declaring invalid the Secretary's decision to reclassify the pertinent highway from primary to secondary status (*id.* at 32). The district court only understood petitioner to claim that the federal respondents had abused their discretion by reclassifying the highway along which petitioner's signs were located from primary to secondary status; the court rejected petitioner's claim on the ground that the reclassification decision did not affect petitioner's rights, because it was not entitled to compensation for the removal of its signs (Pet. App. 33-34). On appeal, petitioner simply argued that it was entitled to judicial review of the allegedly improper reclassification and that the reclassification decision was invalid; petitioner did not argue that it was also entitled to bring suit under 28 U.S.C. 1361 to compel the federal respondents to enforce the deduction penalty of 23 U.S.C. 131(b) (see Appellant's C.A. Br. 2, 22-44, 49).

(Mar. 20, 1985), slip op. 11. Although the Highway Beautification Act empowers the Secretary of Transportation to deduct a percentage of a state's federal highway funds to enforce compliance with the requirements of the Act, the Act does not establish guidelines of any type to circumscribe or channel the Secretary's exercise of her enforcement authority. Indeed, to the extent that the Act speaks to this question at all, it confirms the Secretary's discretion by expressly providing that the Secretary may suspend the penalty provisions of the Act for whatever period she deems necessary whenever she finds that the public interest would be served by her action. 23 U.S.C. 131(b). Accordingly, because the Secretary is not obligated to initiate enforcement actions at the behest of private parties, 28 U.S.C. 1361, which vests jurisdiction in the district courts only where "a duty [is] owed to the plaintiff," does not entitle petitioner to the relief that it seeks.[4]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

AUGUST 1985

---

[4]Moreover, it is dubious whether petitioner has standing to raise this claim, given the fact that the Secretary's decision to initiate enforcement proceedings would not rectify the harm that petitioner has alleged, *i.e.*, the failure to receive compensation for the removal of its signs. See, *e.g.*, *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617-619 (1973).